

COMPLIANCE BOARD OPINION NO. 00-12

November 8, 2000

*Ms. Leslie LeBlanc, Secretary
Citizens Advisory Committee
of Funkstown School*

The Open Meetings Compliance Board has considered your complaint that the Board of Education for Washington County (hereafter “County Board”) held an unlawfully closed meeting on August 15, 2000, concerning the proposed development of a Super Wal-Mart store on property bordering Funkstown Elementary School. For the reasons set forth below, we conclude that in conducting a meeting on this topic, the County Board was carrying out an “executive function” to which the Open Meetings Act was not applicable. Therefore, no violation of the Act occurred in this portion of the closed meeting.¹

I

Complaint and Response

In your complaint, you questioned the propriety of an unannounced, closed meeting between the County Board and a representative of a developer seeking to construct a Wal-Mart store bordering Funkstown Elementary School. This meeting concerned construction of a barrier, separating the school property and the retailer. You also questioned whether the real purpose of the meeting involved discussions of closing the school and the sale of the school property.

¹ Given the scope of your complaint, we do not address matters other than the closed discussion of the Wal-Mart development. We encourage the County Board, however, to review with its counsel the procedural requirements of the Open Meetings Act, including its requirement that a vote to close a meeting must be taken in a meeting open to the public just prior to the closing. *See, e.g.,* Compliance Board Opinion No. 94-5 (July 29, 1994), *reprinted in 1 Official Opinions of the Open Meetings Compliance Board* 73, 83; *see also* Opinion 00-2 (April 10, 2000) (the Act does not permit any variance in the timing of the vote). Under the Act, a member of the public has the right to object to the closing of a meeting. If the required vote occurs in a separate session or in a meeting closed to the public, the public body has effectively eliminated this right.

In a timely response to your complaint, Judith S. Bresler, Esquire, counsel to the County Board, acknowledged that the County Board met with a representative of the developer on August 15, 2000, at a 3:00 p.m. executive session concerning the proposed barrier. However, it is the County Board's position that it was engaged in an executive function and that, under an exclusion in §10-503 of the State Government Article,² the Open Meetings Act did not apply.³ The County Board denied that there was any discussion during this meeting concerning closing the school or sale of the property. In support of its position, the County Board provided us with a copy of its minutes of this meeting along with other documentation relating to the proposed Wal-Mart adjoining the school.

A determination about the executive function can be made only in light of the particular nature of the discussion. Compliance Board Opinion 00-10 (October 18, 2000); Compliance Board Opinion 94-7 (August 16, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 96, 97. Therefore, before evaluating the propriety of the closed meeting, we set out the relevant background.

II

Background

The proposal to build a Super Wal-Mart in the City of Hagerstown has been a matter of considerable public attention. The proposed site is adjacent to Funkstown Elementary School. The school, however, is located outside of the Hagerstown municipal limits.

We are informed in the County Board's response that, at a public meeting on June 20, 2000, the County Board discussed health and safety concerns resulting from the close proximity of the proposed store to the school. The County Board agreed that a letter should be sent to City of Hagerstown officials recommending that a ten-foot, solid masonry wall be required along the entire length of the common boundary. On June 29, the Director of Facilities Management for the Washington County Public Schools wrote to the City's planner on behalf of the County Board. The letter explained the County Board's recommendation and requested that its recommendation be forwarded to the developer.

² Unless otherwise noted, all statutory references are to the State Government Article, Annotated Code of Maryland.

³ In its response, the County Board also suggested that a closed meeting was justified under §10-508(a)(3). Because we agree that the County Board was engaged in an executive function, we need not consider its alternative position.

In response to the letter, Mr. Matt Canady, a representative of the developer, Wyatt Development Co., Inc., asked for an opportunity to discuss a possible easement to construct a barrier on school property. This request led to the meeting at issue. Apparently, a barrier higher than six feet could not be built on property within the City of Hagerstown without obtaining a variance. A ten-foot barrier, however, could be built on the school property. The County Board made clear that it did not want the masonry wall located on school property. According to minutes of the August 15 meeting, the consensus of the County Board was in favor of a six-foot barrier located on the Wal-Mart site if the City of Hagerstown would not approve a ten-foot barrier. In its response, the County Board indicated that the discussion at the August 15 meeting involved primarily information about the developer's current position in discussions with local zoning authorities. According to the County Board, it did "not conduct a vote [or] make any decision" during this meeting. In a letter to Mr. Canady dated August 23, the President of the County Board reiterated the County Board's position about the barrier.

III

Analysis

Once again we evaluate the application of the "executive function" exclusion to a meeting of a local board of education. In a recent opinion, we explored at some length the multiple roles of a county board under the State education law and the application of the Open Meetings Act. We distinguished between a county board's responsibility for setting educational policy and its administrative responsibilities in connection with the local school system. Compliance Board Opinion 00-10 (October 18, 2000). We now consider whether the County Board was engaged in an executive function when it met with a developer concerning the placement of a barrier to minimize the effect of a retail development on a neighboring school.⁴

⁴ We note that the Open Meetings Act is not the only law governing meetings of the County Board. *See, e.g.*, §3-1203 of the Education Article, Annotated Code of Maryland. In the event of a conflict between the Open Meetings Act and another law governing meetings of a public body, the more stringent law applies. *See* §10-504. However, given that our jurisdiction is limited to Open Meetings Act matters, we express no opinion about the import or effect of the Education Article provision.

With exceptions not relevant here,⁵ the Open Meetings Act “does not apply to ... a public body when it is carrying out ... an executive function.” §10-503(a)(1)(i). The term “executive function” is in part defined by what it is not: a discussion of an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function is not an executive function. §10-502(d)(2). If a discussion is not encompassed by any of these other defined functions *and* involves “the administration of” existing law, it falls within the executive function. §10-502(d)(1)(ii). Compliance Board Opinion 00-5 (June 28, 2000). *See also* Office of the Attorney General, *Open Meetings Act Manual* 13 (4th ed. 2000).

Under the State education law, “[a]ll property granted, conveyed, devised, or bequeathed for the use of a particular public school or school system [is] held in trust for the benefit of the school or school system by the ... county board ...” §4-114(a)(1) of the Education Article. As the Attorney General has explained, “[i]n carrying out this trusteeship, the [County Board has] broad authority to operate the school system, *including managing school property*.” *76 Opinions of the Attorney General* 190, 191 (1991) (emphasis supplied). Furthermore, the County Board is charged under State law with providing a healthful school environment. §7-401 of the Education Article.

When meeting with the developer concerning construction of a barrier, the County Board was engaged in an executive function. During this meeting, the County Board was not engaged in legislative or quasi-legislative function or otherwise establishing policy.⁶ Rather, it was managing school property by seeking to minimize the impact of a neighboring development on operation of the school. The County Board was carrying out its existing administrative responsibilities pursuant to State law. Therefore, the Open Meetings Act did not apply.

⁵ The Open Meetings Act does “apply to a public body when it is meeting to consider ... a special exception, variance, conditional use, zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter.” §10-503(b)(2). Although the meeting at issue involved a regulation limiting the height of a barrier wall on the developer’s property absent a variance, any land-use decision rested with the City of Hagerstown, not the County Board. The County Board’s role was limited to considering the effect of the proposed development on school property and the children attending the school.

⁶ Had the County Board discussed the possible sale of the property, it might have been engaged, depending on the circumstances, in an early phase of a quasi-legislative function, the approval of a contract. *See* §10-502(j)(3). There is, however, no indication whatever that the County Board engaged in such a discussion.

IV

Conclusion

In summary, the County Board did not violate the Open Meetings Act when it met in closed session during the afternoon of August 15, 2000, with a developer's representative concerning construction of a barrier separating the proposed Super Wal-Mart and school property. Because the County Board was carrying out an executive function, the Act did not apply.

In its response, and with the benefit of hindsight, the County Board observed that, "for public relations purposes and to avoid unfounded rumors or conjecture ..., it could have met with Mr. Canady in a public session." This realization is both astute and important to all public bodies. Except in the rare circumstance that some other law mandates confidentiality, the fact that a meeting legally *may* be closed does not mean that it *must* be closed. Before closing a meeting under the executive function exclusion or other basis in the Act, a public body should think about the public perception and other implications of closing and whether a closed session is really necessary for the effective conduct of public business.

OPEN MEETINGS COMPLIANCE BOARD*

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*Chairman Walter Sondheim, Jr. did not participate in the preparation or approval of this opinion.